

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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MAR 06 2017

SC Court of Appeals

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Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

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THE STATE,

Respondent,

vs.

RICKEY MAZIQUE,

Appellant.

\_\_\_\_\_  
**RETURN TO PETITION  
FOR REHEARING**  
\_\_\_\_\_

The Respondent now makes this return in opposition to Appellant Mazique's petition for rehearing. Respondent only responds to arguments raised in Appellant's petition and would crave reference to Respondent's previous arguments in its brief and at oral argument. Respondent respectfully submits the following:

(1) Mazique argues this Court erred in denying his motion for substitute counsel. This Court sagely summarized its finding as follows: "We find the court listened to Mazique's complaints about his attorney and found them to not be satisfactory cause for removal; therefore, the trial court did not abuse its discretion in declining to appoint Mazique new counsel seven days before trial." State v. Rickey Mazique, Op. No. 5446, 2016 WL 6092072 at 3 (S.C. Ct. App. filed Oct. 19, 2016). Mazique gave his reasons for seeking substitute counsel, they were not good ones. Further, they were mere

disagreements over trial strategy and tended to show Mazique's lack of understanding of the law. Mere disagreements over trial strategy are insufficient alone to justify appointment of substitute counsel. State v. Jones, 270 S.C. 587, 243 S.E.2d 461, 462 (1978). The trial court did not err. A reviewing court will not interfere with the trial court's decision regarding a request for substitute counsel absent an abuse of discretion. State v. Marshall, 273 S.C. 552, 257 S.E.2d 740 (1979).

(2) Mazique complains this Court erred in finding the trial court did not err in declining to allow Mazique to represent himself. The trial was for armed robbery of a convenience store Mazique frequented for hours at a time – Mazique was friendly with the store clerk who was present at the time of the robbery. Mazique chose to rob this store with just a wig as a disguise while this store clerk was on duty. Mazique's judgment would prove equally bad during the trial in which he represented himself. The trial court, understanding Mazique's lack of understanding of the law, did not err in declining to relieve counsel and allow Mazique to proceed pro se during the Jackson v. Denno hearing.

As this Court correctly notes, Mazique was not asking to represent himself at the start of pre-trial hearings. He explained to the trial court he did not want to represent himself, he was not qualified, he just wanted another attorney. ROA. p. 16, lines 4-5. The request to proceed pro se must be clearly asserted by the defendant prior to trial." State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010) (quoting Farretta v. California, 422 U.S. 806 (1975)).

"The requirement that the assertion be clear and unequivocal 'is necessary to protect against an inadvertent waiver of the right to counsel by a defendant's occasional

musings,’ and it also ‘prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation.’” United States v. Bush, 404 F.3d 263, 271 (4th Cir. 2005) (quoting Frazier-El, 204 F.3d at 558-59). “This protection against an inadvertent waiver of the right to counsel is especially important because representation by counsel does not merely tend to ensure justice for the individual criminal defendant, it marks the process as fair and legitimate, sustaining public confidence in the system and in the rule of law.” Frazier-El, at 559 (citation and internal quotation marks omitted). “The requirement that a request for self-representation be clear and unequivocal also prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation.” Id.

“In ambiguous situations created by a defendant’s vacillation or manipulation, we must ascribe a ‘constitutional primacy’ to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation.” Id.

“At bottom, the Faretta right to self-representation is not absolute, and the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.” Id. (citation and internal quotation marks omitted).

Finally, the record indicates that the trial court did not abuse its discretion by provisionally retaining Knowles as Mazique’s counsel. A request for self-representation must “generally must be asserted before meaningful trial proceedings have begun.” United States v. Hilton, 701 F.3d 959, 965 (4th Cir. 2012). Thereafter, a defendant’s

request for self-representation is a matter submitted to the sound discretion of the trial court. Id.

“[I]nvocation [of the right to self-representation] does not set into motion rigid, mechanical procedures that must be followed to the letter to avoid an error. The invocation of the right and whether the proper procedures were followed must be evaluated in the context of a given case.” Swan v. Commonwealth, 384 S.W.3d 77, 94-95 (Ky. 2012). “[W]hile the right is a structural right, it must still be applied in the real world, which sometimes requires a practical approach, not an absolute and unbending one.” Id. at 95.

“Even if a request is unequivocal, timely, voluntary, knowing, and intelligent, a court may defer ruling if the court is reasonably unprepared to immediately respond to the request.” State v. Madsen, 229 P.3d 714, 717 (Wash. 2010). “The trial court was within the bounds of proper discretion to delay ruling on the matter until it could properly prepare to rule on the issue.” Id. at 718. “[A] court’s discretionary decision to defer ruling on a motion to proceed pro se should be upheld if the deferral was based on tenable grounds and tenable reasons.” Id. at 722.

The tenable reason and tenable ground for deferral is easily seen from this Court’s extensive recounting of the events during the pre-trial hearings. Mazique’s first arguably unequivocal assertion of his right to proceed pro se only came during the Jackson v. Denno hearing and under circumstances suggesting Mazique’s judgment was tainted by his not getting his way with his counsel or with the trial court over his request for substitute counsel. Certainly, it was no particular feat of clairvoyance to understand that Mazique did not have the understanding to adequately represent himself during the

Denno hearing. Accordingly, this Court's analysis of this issue is correct and the trial court did not err.

As to the claim that he was denied his right during jury selection, nothing in the record indicates he was prevented from making a contemporaneous objection to the jury selected. As far as this Court and the appellate attorneys know, Mazique might have shook his head in agreement when counsel stated no objection. The limitations of reviewing the cold record is a major reason such matters are left in the broad discretion of the trial court. See Gavin v. State, 473 So.2d 952, 955 (1985) ("even if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire" ) (cited with approval, Clemmons v. Mississippi, 494 U.S. 738, 766, 110 S.Ct. 1441 (1990) (Blackmun, J., dissenting)).

(3) Mazique complains the prosecutor took advantage of his self-representation and this Court should overlook his failure to object to the prosecution's supposed improper comments. Ironically, this follows Mazique's claim he should have been allowed to represent himself sooner. Mazique's complaints are not preserved for review. Pro se defendants are not entitled to clear error review. Further, the comments during opening and closing were not improper or prejudicial.

Mazique, overwhelmed by his lack of knowledge of the law and procedure, and the overwhelming evidence presented against him, resorted to attacking the prosecutor, claiming he was misleading the jury and arguing the solicitor had an obligation to

investigate before charging. It is incredulous for Mazique to claim in his petition that “the solicitor’s comments clearly were not in response to anything.” Pet. for reh. p. 5. Mazique’s comments were calculated to suggest that the evidence the prosecution presented was fraudulent and that the prosecutor did not perform his duty to investigate. The prosecution has the right to stand up for itself against such specious allegations. Contrary to Mazique’s claim, no part of the prosecutor’s opening “invited” an attack on on the prosecutor’s character during Mazique’s closing argument. The invited reply doctrine is wholly applicable to the prosecutor’s comments during closing argument. Vaughn v. State, 363 S.C. 163, 607 S.E.2d 72 (2004).

(4) This Court correctly determined the trial court did not err and Mazique was not prejudiced by the trial court’s refusal to require the State to play the entire audio of the police interview. The redacted portions were harmful, not helpful to Mazique’s case. So Mazique was not prejudiced, he was helped, temporarily, by the trial court’s refusal to apply Rule 106, SCRE. The admission or exclusion of evidence is a matter addressed to the trial court’s sound discretion and will not be reversed absent a manifest abuse of the trial court’s discretion and probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). “An error without prejudice does not warrant reversal.” State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005).

Mazique operates under a misunderstanding that Rule 106 is automatic in its application. Rule 106 is a procedural rule that governs the timing of the completion of evidence and is designed to affect the order of proof. State v. Taylor, 333 S.C. 159, 170-71, 508 S.E.2d 870, 876 (1998). There is no requirement that the writings or recordings be contemporaneous or responsive to one another. State v. Tennant, 394 S.C. 5, 14, 714

S.E.2d 297, 302 (2011). The Supreme Court explained in Tennant that “[t]he standard here is ‘fairness,’ not responsiveness.” Id. (emphasis added). Tennant quotes, with approval, the Fed.R.Evid. 106 advisory committee’s note as follows: “The [corresponding federal] rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial.”

In the instant case, Mazique failed to explain, either to the trial court, or this Court, why Defense Exhibit #1 should have, in fairness, been considered contemporaneously with State’s Exhibit #23. Mazique seems to make the fundamental mistake that the rule of completeness applies automatically or in some ministerial fashion without regard to the substance of the writing or writings (or in this case recordings) involved. See Tennant (finding the trial court did not abuse its discretion in denying appellant’s request to admit a purported suicide note disclaiming responsibility for the crime: “while relevant, [it] was not so inextricably connected to the letter introduced by the State that its omission was patently unfair.”).

Further, Mazique’s claim of prejudice is off the mark. The prejudice is measured by the potential impact of excluded evidence, not Mazique’s subsequent strategic decisions. Further, there is no merit to Mazique’s startling claim that “[t]his Court can not say that had Mazique not been forced to put up the audio that he would have put up the two witnesses.” Pet. for rhg. pp. 8-9. Assuming any error, Mazique was not entitled to call as many witnesses he wanted and still claim prejudice from having to call a single witness to admit the evidence he claims should have been previously admitted. Further, the burden is on Mazique, as an appellant, to demonstrate prejudice.

(5) The State agrees with this Court's keen observation that Mazique failed to preserve the issue of whether Officer Chatfield should have been required to turn over the notes. Mazique failed to offer any explanation of why he was entitled to the notes. He was not entitled to the notes under Rule 5, SCRCrimP. Under Rule 5 (a)(2), SCRCrimP, discovery or inspection is not authorized for "reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case . . ." In State v. Bryant, 304 S.C. 488, 405 S.E.2d 423 (Ct. App. 1991) *rev'd on other grounds by State v. Bryant*, 307 S.C. 458, 415 S.E.2d 806 (1992), this Court rejected the appellant's contention that the trial court erred in not requiring a police officer's notes be turned over to the defense under Rule 5, noting the officer's notes "are clearly internal prosecution documents and, therefore, not covered by Rule 5." Id. at 490, 405 S.E.2d at 424.

Actually, it is unclear whether or not handwritten notes existed. When asked if he took his own personal notes, Officer Chatfield responded: "Did I take my own personal notes, everything that I have is in the case file." ROA. p. 274, lines 20-23. If there were notes, Mazique should have moved to have the notes reviewed by the trial court in camera or moved to admit them as a court's exhibit.

Mazique recalled Officer Chatfield to the stand during his case, and the trial court asked Officer Chatfield to provide Mazique with a synopsis that Officer Chatfield prepared. ROA. pp. 264-265. It is unclear whether this synopsis constitutes the notes referred to earlier in trial. However, Mazique requested Officer Chatfield publish the following portion of the synopsis: "Mazique stated the bullets in apartment were his, stated he threw the firearm near 501 but would not confess to robbing the store." ROA.

p. 366, lines 7-11. Officer Chatfield subsequently noted he was investigating Mazique for a “multitude of cases” in explaining the discrepancy from the audio taped interviews. ROA. p. 366, lines 14-18. Given that recordings of the interviews were submitted into evidence, the jury could determine whether or not Mazique confessed. Mazique failed to show the notes contained, or were even likely to contain, evidence favorable to him. A violation of Rule 5, SCRE is not reversible unless prejudice is shown. State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006).

In his petition for rehearing, Mazique only disputes error preservation and fails to argue the basis of his claim that the State violated Rule 5 or explain any reason to believe the notes carried exculpatory value.

(6) In his sixth issue, Mazique claimed the trial court erred in limiting his cross-examination of law enforcement. This Court correctly found that Mazique failed to cite any case law for his assertions and therefore, the argument was abandoned. This Court cited State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011), which holds an issue is deemed abandoned on appeal if the argument in the brief is unsupported by authority.

However, Mazique cites no authority in his petition for rehearing in support of the claim that his argument was sufficient for the issue to be addressed by this Court. This Court found a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal. State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998). Mazique’s argument in his petition was one paragraph and cited no authority except, vaguely, the Sixth Amendment. The argument for the petition for rehearing is insufficient to be addressed by this Court.

(7) Mazique never asked the robbery victim if she had any pending charges. Mazique instead asked the irrelevant question of whether she had any prior arrests. Of course the issue is not preserved for review. The burden is on appellant to provide a sufficient record for review. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 644 (1998); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Failure to make an offer of proof precludes consideration of an issue on appeal. State v. Cabbagestalk, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984). The record is limited to that matter placed before the trial court. SCACR Rule 210(c). If Branton had pending charges, Mazique needed to bring that to the trial court's attention if this Court were to speculate and entertain the proposition that Mazique was attempting to elicit such testimony.

The reviewing court may not consider alleged error in excluding testimony unless the record shows fairly what the rejected testimony would have been. State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979). Failure to raise an argument against exclusion of testimony and to proffer witness's testimony, had it been allowed, means the issue is not preserved for review. State v. Simmons, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004).

Quite simply, the argument advanced now on appeal was not raised and ruled on below and therefore is not preserved for review. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005). Accordingly, this Court should not review this issue.

If he wanted to ask the question about pending charges, assuming that ever crossed his mind at trial, he should have asked the trial court before the witness took the stand or at a minimum, while the jury was out. Or he should have just asked the question. Being prevented from asking an irrelevant question does not entitle him to

speculative review of different arguably relevant questions his appellate counsel imagined he might have asked. This Court properly found the issue was not preserved for review.

(8) Mazique raised seven issues on appeal, several of which this Court properly determined are not reviewable. Issues one and two are structural questions not relevant to the cumulative error doctrine. This Court properly found no error in the issues it reviewed. Zero times seven is zero. There is no cumulative error because there is no error. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (finding review of any remaining issues is unnecessary where determination of other issues is dispositive of the appeal).

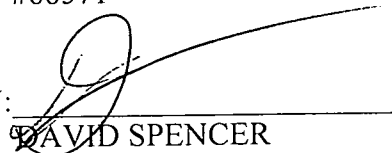
Accordingly, the State respectfully requests the petition for rehearing be denied.

Respectfully Submitted,

ALAN WILSON  
Attorney General

DAVID SPENCER  
Senior Assistant Attorney General  
Bar #68571

BY:



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ATTORNEYS FOR RESPONDENT

March 4, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal From Horry County  
The Honorable Edward B. Cottingham, Circuit Court Judge

Appellate Case No: 2012-213631  
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**RECEIVED**

MAR 06 2017

**SC Court of Appeals**

THE STATE,

Respondent,

v.

RICKEY MAZIQUE,

Appellant.

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**PROOF OF SERVICE**  
\_\_\_\_\_

I, Anne Mueller, certify that I have served the Return to the Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record J. Falkner Wilkes, Esquire, 114 Whitsett Street, Greenville, SC 29501-3139.

I further certify that all parties required by Rule to be served have been served.

This 6<sup>th</sup> day of March, 2017.



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**RECEIVED**  
MAR 06 2017  
SC Court of Appeals

ALAN WILSON  
ATTORNEY GENERAL

March 6, 2017

The Honorable Jenny Abbott Kitchings  
Clerk of Court, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29201

Re: The State v. Rickey Mazique  
Appellate Case No: 2012-213631

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of the Return to the Petition for Rehearing, including proof of service, in the above-referenced case.

Sincerely,

David Spencer  
Assistant Attorney General  
S.C. Bar No: 68571

DS/aam  
Enclosures

cc: J. Falkner Wilkes, Esquire (with two copies)  
Ms. Trisha Allen